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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 534.

RAY INGELS, as Director of the Department of Motor Vehicles of the State of California, et al.,
Appellants,

v.

PAUL GRAY, INC., a California corporation, et al.,
Appellees.

Appeal From the District Court of the United States for the Southern District of California.

REPLY BRIEF OF APPELLANTS.

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CASES CITED.

PAGE

Aero-Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285 5

Bradley v. Public Utilities Commission of Ohio, 289 U. S. 92 4

Buck v. Kuykendall, 267 U. S. 307 4

Clyde Mallory Lines v. Alabama, 296 U. S. 261 13

Continental Baking Co. v. Woodring, 286 U. S. 352 5

Dooley v. Pease, 180 U. S. 126 2

Euclid v. Ambler Realty Co., 272 U. S. 365 ..... 3, 15

Hicklin v. Coney, 290 U. S. 169 5

Ingels v. Morf, 300 U. S. 290 3

Interstate Transit, Inc. v. Lindsey, 283 U. S. 183 3

Morf v. Bingaman, 298 U. S. 407 ..... 4, 14

Murphy v. California, 225 U. S. 623 13

Smith v. Cahoon, 283 U. S. 553 5

South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177 ..... 2, 3

Sproles v. Binford, 286 U. S. 374 ..... 5, 14

Standard Oil Co. v. Marysville, 279 U. S. 582 3

Holyoke Water Power Co. v. American Writing Paper Co., 300 U. S. 324 15

Kentucky Whip & Collar Co. v. Illinois Central R. Co., 299 U. S. 334 15

Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192 15

United States v. Carolene Products Co., 304 U. S. 144 15

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SUMMARY OF APPELLANTS' REPLY ARGUMENT.

1. Appellees are in error as to the effect of the District Court's findings of fact. Page 2
2. Appellees are in error as to their contentions on the burden of proof. Page 3

3. *Buck* v. *Kuykendall*, 267 U. S. 307, is not in point. Page 4

4. *Smith* v. *Cahoon*, 283 U. S. 553, does not sustain appellees' position. Page 5

5. Appellees' traffic is a caravan movement. Page..... 6

6. Appellees' criticism of affidavits not justified. Page.... 8

7. Reply to appellees' argument on classification. Page 8

1.

Appellees take a patently erroneous view of the effect of the District Court's findings of fact. On pages 14 and 67 they cite *Dooley* v. *Pease*, 180 U. S. 126, to the effect that if there is any evidence to support a finding of fact it will not be disturbed on appeal. That case is not applicable here; that was a law action with the jury waived, ordinary litigation between private parties, and of course the Court's findings were the equivalent of those of a jury.

An entirely different rule obtains here, however, where the constitutionality of a state law is in question. We pointed this out briefly on page 16 of our first brief. The rule governing the instant case is this: The legislature has in the first instance based its action upon facts found by it, and

> "Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence in reviewing the present determination *we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis.*" (Citing cases.)
>
> *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177.

It makes no difference that there may be opposing evidence sufficient to support the lower court's findings. *This Court has reviewed the facts and reversed decrees of lower courts which failed to adhere to this rule. Standard Oil Co.* v. *Marysville,* 279 U. S. 582; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365; *South Carolina State Highway Department* v. *Barnwell Bros., supra.*

It is manifest that the Record not only fails to show that the classification made by the Caravan Act is without rational basis, but that the Record does abundantly support the classification.

In our first brief we discusssed the evidence and pointed out that the District Court's findings of facts are not supported by it; that on the contrary it supports the legislative action. And, as pointed out in the cases above cited, the inquiry in this case is limited to whether the record shows there is no basis for the legislative action, regardless of the Court's findings.

2.

Appellees are in error as to their contentions on the burden of proof in pages 62-64 of their brief. The rule is (and always has been) that where it appears from the face of the statute, as here (or otherwise appears), that fees required of motor vehicle operators, either interstate or intrastate or both, are exacted as compensation for the privilege of using the highways, or for the administration of the law and regulation of the traffic, or for both purposes, the burden rests on one attacking the law to prove that the fees required are excessive for these purposes. Every case, from earliest to latest, has so declared. See *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183 at 186; *Ingels* v. *Morf,* 300 U. S. 290 at 296; and cases cited. The authorities cited by appellees are not in point here; it suffices to say they have not changed any rule. The fact that the fees are

required of both interstate and intrastate operators obviously does not change the rule, *Morf* v. *Bingaman*, 298 U. S. 407 at 410.

3.

Appellees lay great stress upon *Buck* v. *Kuykendall*, 267 U. S. 307 (brief pp. 33-36, 40-41, 53, 55, 61), but it is obvious that case has no bearing upon this one, as is evident from a reading of *Bradley* v. *Public Utilities Commission of Ohio*, 289 U. S. 92, at page 95, where the limitations of the *Buck* case are explained. The statute condemned in *Buck* v. *Kuykendall* had nothing to do with the power of the state to tax and police the traffic of interstate motor vehicle operators, which are the only powers in question here. Rather, the statute in the *Buck* case was held invalid because, as to motor vehicle traffic (267 U. S. at 316):

> "• • • it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce."

That is, the law authorized the state officials to determine public convenience and necessity as to interstate transportation, which is a field of action denied to the states even in the absence (at that time) of action by Congress. Obviously the Caravan Act does not touch that field, and no claim has been, or could be, made that it does. The Caravan Act, admittedly, deals with legitimate fields of state action.

In *Bradley* v. *Public Utilities Commission of Ohio, supra*, the action of state officials in denying a common carrier by motor vehicle a certificate to operate in interstate commerce was sustained because the state action was based on maintenance of safety on the highways. While the first part of

the opinion states that the motor carrier had failed to show that any other route was open to him, the later part of the opinion clearly shows that the decision did not turn on that point.

Thus in the *Bradley* case, where the state's denial of interstate operation was based upon a ground within the sphere of state action, the police power regulation of traffic, the state action was sustained. The state's denial in the *Buck* case was based on consideration of public convenience and necessity, altogether outside of state power, and was therefore annulled by this Court without any inquiry as to its reasonableness.

4.

Appellees also stress *Smith* v. *Cahoon*, 283 U. S. 553 (brief pp. 37-41, 52, 54), but it is likewise evident that case affords no authority against the Caravan Act. For no observable reason that case appears to have been much misunderstood, and it has been distinguished and explained in later cases. As was said in *Aero-Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, at 292:

> "*Smith* v. *Cahoon* has been considered in later cases in this Court, and the limits of its holding, clear enough at the beginning, have been brought out in sharp relief."

The cases which have considered *Smith* v. *Cahoon*, with respect to the principles here involved, all sustained statutes which either in terms or in practical operation created zones similar in effect to the zoning features of the Caravan Law, and sustained exemptions wider in scope. These cases (all cited in our first brief) are: *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, at pages 368, 371-373; *Sproles* v. *Binford*, 286 U. S. 374, page 394; *Hicklin* v. *Coney*, 290 U. S. 169, pages 173, 175; and *Aero-Mayflower Transit Co.* v. *Georgia Public Service Comm.*, 295 U. S. 285, pages 291-293.

Two reasons were stated for holding the statute bad in *Smith* v. *Cahoon*. One was vagueness. The other was that carriers of the same type were differently classified for liability insurance requirements. There is no charge of vagueness in this case; and every person moving motor vehicles in caravans is subject to the law and those who do not operate caravans are not subject to it.

5.

Appellees take issue with our statements in our first brief (pp. 6, 44, 45), that the general stipulation (R. 72-75) and the Manford testimony (R. 75-77) were not related to appellees, but that appellees' entire operations consist of the movement of cars in fleets of 19 to 25 as described in the Asher testimony (R. 105-107), made applicable by stipulation to the caravaning of cars of all of the appellees (R. 107).

We do not want to burden the Court with a squabble over the meaning of the evidence. In Part II of our brief (pp. 46-57) we argue that the Act is valid as to the entire volume of the included traffic, both single vehicles and caravans. It is altogether proper, however, to say that if appellees move all of their vehicles in caravans of 19 to 25 vehicles as described by Mr. Asher, they are not in position to claim the advantage, if any, inuring from the fact that the stipulation (R. 72-75) and the Manford testimony (R. 75-77) show that some singly driven vehicles not in caravan are brought into the State for purpose of sale; and we believe that Record shows that appellees' operations are confined to the caravan movements described by Mr. Asher.

This seemed so evident that we did not in our first brief do much more than mention the point. It may be that a little further consideration of it is in order.

The general stipulation (if it is considered not to be withdrawn by putting Manford on the stand), and the Manford testimony came at the beginning of the testimony. No at-

tempt or offer was made to apply it to anyone in particular. Appellants accepted it, but at that time it was preliminary evidence, and appellants could not then know whether it was meant to be applicable to all of the appellees or whether later on it would be linked to some of them. Obviously it was not meant to be applicable to appellees generally or to any appellee in particular, because none of its terms fits or corresponds to the Asher testimony as to caravans of 19 to 25 vehicles. Thereafter Mr. Asher testified in specific terms (R. 105-107) as to his operations, and a stipulation applying that to all appellees was offered by counsel for appellees and was accepted (R. 107).

Appellees' bill of complaint alleges only one type of operation, *a movement of automobiles in convoy.* See paragraph VII (R. 3). The one automobile which is described was driven "in convoy with other caravaned automobiles." There is no allegation anywhere in the bill of complaint that appellees bring cars into the state for purpose of sale singly and not in company with other automobiles. There is no claim in the bill of complaint that the Act discriminates against appellees with respect to automobiles brought in singly. The claims which appellees now make as to unconstitutionality because of single cars brought into the state for sale do not appear, even by the remotest inference, in the bill of complaint. In fact the only allegation relating in any way to a single car movement was amended by appellees in such a way as to allege a movement in convoy. (R. 17, 18, 21)

The findings of fact (R. 57) contain nothing as to single car movements by appellees. If there were such surely that would appear in the findings.

However, giving to all the evidence the most favorable construction appellees claim for it, eighty per cent of appellees' vehicles must move in fleets of 19 to 25 vehicles as described by Mr. Asher.

6.

Appellees make unwarranted criticism of the affidavits which are part of appelllants' evidence (pp. 46-47 appellees' brief). Most of these affidavits were filed at the time of the hearing on the application for temporary injunction on October 8, 1937. A few were filed later, but all except the Cato affidavit were on file some months before the final hearing on May 4, 1938 (R. 71-72). It was stipulated on April 22, 1938, that all of the affidavits then on file should be a part of the evidence on which the case would be submitted on final hearing, and that the Cato affidavit should be received as evidence on such final hearing subject to appellees' motion to strike portions of it (R. 24). The motion to strike was overruled (R. 24, 35).

It thus appears that appellees knew the contents of these affidavits long before the final hearing, but filed no affidavits and introduced no evidence to controvert any of their allegations. Their effect is the same as if it had been stipulated that the affiants, if called, would testify as stated in the affidavits.

7.

Appellees (Brief pp. 31-32) attack the zoning provisions by repeating the opinion of the District Court that the creation of the zones was an attempt to make an appearance of difference where none exists. *All of the evidence on the subject is directly to the contrary, however.* The affidavits of Ingels (R. 113), Bates (R. 156), and Edenholm (R. 118), furnish undisputed evidence that there is a substantial volume of caravans moving from one zone to another. To illustrate the weakness of Appellees' position and the District Court's opinion, let us assume that at this point we are dealing with the former law which included only the movement from without the state. In the face of the evi-

dence furnished by these three affidavits Appellees assuredly would have charged that the law was invalid because it exempted a substantial fleet movement.

That illustrates the reason for the zone provision; all of the fleet movement is included within the law; *there is no evidence that any fleet movement is omitted from it.*

Also, there are only two practical highways for motor vehicles between Los Angeles and San Francisco. They are narrow, two-lane, roads at approximately the line dividing the two zones, virtually bottlenecks and subject to congestion (R. 156). This is a factor justifying the zone provision.

Appellees (Brief p. 31) point to the testimony of Captain Personius as an indication that the fleet movements are entirely interstate.

Appellees are mistaken; they picked out a few words from the context in such a way as to rob the statement of its correct meaning. Here is the whole statement (R. 82):

> "The main route that I am familiar with is U. S. 40 coming through Truckee and there is a large amount of fleet movement over that highway. The fleet movements were entirely interstate."

Obviously he was then referring to U. S. 40 out of Truckee (a trifle southwest of Reno on the map opposite page 32 of Appellants' brief), in the middle of the extreme east side of Zone 2, where he would have no opportunity to observe fleets moving from one zone to another.

Appellees urge that the distinction between interstate and intrazone traffic is invalid (Brief pp. 42-46).

We analyzed the evidence showing the volume, extent and character of this movement in pages 27-39 of our first brief. Unsoundness of the objections urged by appellees are evident from our analysis. Appellees' emphasis of the volume of the intrazone traffic, however, suggests that a

little further development of the evidence summarized in pages 27-39 of our first brief will demonstrate even more forcibly the validity, in fact the actual legal necessity, of the intrazone exemption.

True enough, more cars move intrazone on their own wheels for purpose of sale than move interstate for that purpose. But of the volume of intrazone traffic, more than 97 per cent moves entirely within the metropolitan areas around San Francisco and Los Angeles shown in the upper right and lower left corners of the map opposite page 32 of our first brief. And of the less than 3 per cent moving outside of such areas, more than 70 per cent moves less than 75 miles. The foregoing will be demonstrated shortly.

Appellants state that these metropolitan areas are congested. There is no evidence of any traffic congestion in them. The undisputed evidence is to the contrary (R. 155). The legislature evidently concluded that these metropolitan areas have more facilities for policing traffic and moving it expeditiously than exist on the two-lane rural highways, and that the movement of cars for sale in these areas, of the character shown by the evidence, did not call for the same license fees and regulations as the movement included in the act. There is absolutely nothing in the Record which warrants the annulment of the legislative judgment as expressed in that act; on the contrary, the Record supports the legislative judgment.

Going now to the further analysis of the volume and extent of the intrazone traffic. The following page numbers refer to our first brief. In the first six months of 1937 there were 10,595 cars delivered on their own wheels from the General Motors Southgate factory near Los Angeles, and only 18 of these went outside the Los Angeles metropolitan area, defined on the map opposite page 32 by the circle with a 20 mile radius around the Los Angeles area (p. 35). The Murchison testimony and the Hunt affidavit (pp. 37 and 36, our first brief) establish that about 20,000

cars per year are driven away from the Chrysler assembly plant at Maywood, contiguous to Los Angeles, but that less than 400 per year of these go outside such defined Los Angeles metropolitan area.

In the first seven months of 1937, from the Chevrolet factory near San Francisco, which supplies all of California, 668 vehicles were delivered intrazone outside the San Francisco metropolitan area, defined by the evidence as the area in the upper right corner of the map opposite page 32 of our first brief enclosed by the circle with a 15 miles radius. The number delivered within the metropolitan area is not stated but must have been large (pp. 31-32). The distances the 668 moved are shown on page 32 of our first brief. From the Ford factory at Long Beach, just south of Los Angeles, in April and May, 1937, only 117 cars were driven intrazone at all, the distances being shown on pages 33-34 of our first brief.

Two hundred fifty new Studebaker cars per month are driven from the factory at Maywood, contiguous to Los Angeles, but all to points within a thirty mile radius from Maywood, substantially from Los Angeles (p. 38); this is only ten miles outside what is defined as the metropolitan area. Of the 150 new International trucks per month which are the subject of the stipulation at page 81, Record, 120 are delivered within the 20-mile radius Los Angeles metropolitan area (pp. 38-39). Appellees' witness Miske testified to moving 25 trucks per month in Zone 1 and 250 to 300 per month in Zone 2. Not to exceed 25 per cent of these are delivered within the metropolitan areas, but the actual distances the others move are not shown (p. 38). The affidavits relating to the other assembly plants (R. 131, 133, 135, 136, 147) do not furnish numerical comparisons, but state that the driveaway deliveries are in most cases effected within a radius of 75 to 100 miles. In the light of the other affidavits, most of these deliveries must have been within the metropolitan areas.

Summarizing the intrazone figures on the basis of comparing the number of deliveries within the Los Angeles and San Francisco metropolitan areas with the number of deliveries outside of such areas, we have, so far as numbers are available, the following:

Factory	*Total Number Delivered on Own Wheels Per Year Intrazone*	*Number of These Delivered Outside Metropolitan Areas*
GENERAL MOTORS Near Los Angeles (Southgate)	21,000	36
CHRYSLER Near Los Angeles	20,000	400
CHEVROLET Near San Francisco	Many, but not stated	668 in 7 Months
FORD At Long Beach	117 in 2 Months	53 in 2 Mos. (R. 122)
STUDEBAKER At Maywood near Los Angeles	3,000 (All within a radius of 30 miles)	
INTERNATIONAL	1,800	360

From the figures available it appears that not more than 3 per cent of the intrazone driveway deliveries are made outside of the metropolitan areas of Los Angeles and San Francisco. Of this 3 per cent, representative tables showing the length of deliveries appear at pages 32, 34 and 35 of our first brief. Seventy per cent of these are less than 75 miles.

So, if, as estimated by Appellees and the District Court (Appellees' Brief, pp. 42-43), 75,000 cars per year are moved intrazone for purpose of sale, the evidence indicates the following. About 3 per cent of this number, or 2250, go outside the Los Angeles and San Francisco metropolitan areas as defined on the map. Only 30 per cent of this 2250, or 675, move more than 75 miles; and only a very few beyond 100 or 125 miles.

And this intrazone traffic is entirely different than the interstate traffic conducted by the plaintiffs. That is also covered in pages 27-39 of our first brief. Appellees apparently claim that this is a movement of 2, 3, or 4 cars at a time. This is not correct. It is undisputed that each car is operated by its own driver. And mostly the cars are driven not in company with any other cars. It is only occasionally that 2 or 3 cars start away together (R. 119, 122-125, 127, 128, 131, 134, 136, 138, 150). And that is only a short journey, nothing like the integrated fleet movement of 19 to 25 cars operated long distances.

Appellees (brief, p. 35) talk about caravan movements on the highways not for the purpose of moving vehicles for sale. There is no evidence of any such traffic in the Record. That it does not exist is further attested by the fact that no statute, court decision, or treatise on highway regulation has ever considered it. In view of all of the statutes and administrative rulings for the purpose of controlling the movement of automobiles for purpose of sale, and the fact that traffic is identified in statutes, administrative rulings, decisions of the Interstate Commerce Commission, and otherwise, as *the* caravan operation, appellees' argument has no validity.

Appellees (brief, pp. 23-24) also describe other traffic conditions as to which there is no evidence in the Record. In any event, the whole subject of highway regulation is known to the legislature and there is nothing in the Record nor anything of common knowledge to indicate that the selection of the class was discriminatory.

The fact that appellees may not have required the particular attention of traffic officers in no way disproves the validity of the act. *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261 at 266; *Murphy* v. *California*, 225 U. S. 623 at 629. The traffic has been recognized by competent authority as extra hazardous, and accidents due to the particular manner

of caravan operation, including type of drivers used, have occurred (R. 157-160, 153-154, 140, 114, 118).

Appellees assert (brief pp. 48-54) that the statute is discriminatory as to cars moved into the state singly and not in caravan, the discrimination favoring cars coming into or moving in the state not for sale and cars moving for sale intrazone. This argument has been answered, we believe, in various places in our first brief, but we desire at this time to point out specifically a few ways in which single cars, not in caravan but subject to the act, differ from single cars not subject to the act. Single cars coming into the state for sale are driven by drivers obtained by want-ads in mid-western states, hired for the one trip only, unfamiliar with California mountain highways, and generally fatigued when California is reached at the end of a 2000 mile trip (R. 106, 114, 140-141, 153-154, 158). Captain Personius testified to the single caravan car constituting a special problem for some of these reasons (R. 96). As was said in *Morf* v. *Bingaman*, 298 U. S. 407: "The legislature may readily have concluded, as did the trial court, that the drivers have little interest in the business or the vehicle they drive and less regard than drivers of state licensed cars for the safety and convenience of others using the highways." The drivers of cars intrazone for sale are all California residents, are licensed chauffeurs, are steadily employed for the purpose of such driving, and some are under bond (R. 78-79, 80, 119-120, 127, 128). The trip is short. Furthermore, there is another distinction that may be mentioned between single cars subject to the act and cars driven not for sale; the former are being driven as and for the transportation of property for commercial gain, while the latter are driven solely for the transportation of persons. The legislature may validly classify between highway users on that basis, *Sproles* v. *Binford*, 286 U. S. 374. There the Texas law limiting truck weights was held valid although such limita-

tions did not apply to passenger busses. These circumstances, coupled with the fact (conceding for argument everything appellees claim for the Record) that single cars driven into the state for sale under the conditions described are only twenty per cent of the entire traffic, the remaining eighty per cent being cars in caravans of 19 to 25 vehicles, and the further fact that the operators of the twenty per cent are also the operators of the eighty per cent, assuredly justify the act as to the entire traffic. Particularly is this true in view of the principles expressed in the cases cited in pages 56-57 of our first brief.

Appellees (brief, pp. 55-56) concede the validity of the principle expressed in *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, and *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, but deny its application to this case. As a reply to appellees' argument we cite later cases making other applications of this rule: *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 353; *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, 341; and *United States* v. *Carolene Products Co.*, 304 U. S. 144, 151.

We think the other points raised in appellees' brief are fully answered in our first brief; and we have tried to avoid making this reply brief a re-argument of the case by covering every point made in appellees' brief.

Respectfully submitted,

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